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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1865

BERNARD OSTRAGER,
Appellant,

vs.

STATE BOARD OF CONTROL, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellant, Bernard Ostrager, a resident of New York, appeals from a decision of the Court of Appeal of the State of California (First Appellate District, Division Four), which affirmed the judgment of the trial court in favor of Appellees.* A petition for hearing was denied by the Supreme Court of California. Appellant submits that the Supreme Court of the United States has jurisdiction of this appeal and that the appeal presents substantial constitutional questions.

OPINION BELOW

The opinion of the Court of Appeal, which is reprinted in the appendix (p. A-1, *infra*) is reported at 99 Cal.App.3d

*The Appellees are the State Board of Control and the individual members thereof in their official capacities.

1, 160 Cal.Rptr. 317 (1979). The order of the Supreme Court of California denying a hearing, which is reprinted in the appendix (p. B-1, *infra*), is reported in the advance sheets for 26 Cal.3d (Cal. Official Reports No. 8, Mar. 18, 1980, Minutes, p. 5).

JURISDICTION

On November 29, 1979, the Court of Appeal filed its judgment. On February 27, 1980, the Supreme Court of California denied appellant's petition for hearing. On May 16, 1980, appellant, in the Court of Appeal, filed his notice of appeal to this Court. (App. p. C-1, *infra.*) This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1257(2).

CALIFORNIA STATUTE IN ISSUE

The Victims of Crime Act, Cal. Gov. Code §§ 13959-969.1 (summarized, *infra,* at 5-7), provides in section 13961(a) as follows:

> "A victim of a crime of violence may file an application for assistance with the board provided that the victim was a resident of California at the time the crime was committed and either:
>
> "(1) The crime was commited in California; or
>
> "(2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state."

QUESTIONS PRESENTED

1. Under the Privileges and Immunities Clause of Article IV of the Constitution of the United States, may victims of violent crime in California be excluded from assistance under the state's victims of crime act solely on the ground that they are nonresidents?

2. Is the state's discrimination against victims of violent crime, solely on the basis of their nonresidence, also repugnant to the Equal Protection Clause, the Commerce Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. Summary of the Facts

The facts are brief and stipulated. (CT 145-151.)[1] On November 23, 1976, Bernard Ostrager (appellant), a citizen of the State of New York, was shot in the left leg by a person unknown to him, while he was on vacation in San Francisco, California. (CT 146.) He was immediately hospitalized at Saint Francis Memorial Hospital, where he received surgical and medical treatment. (CT 146.)

A San Francisco police officer investigated the sniping, spoke with appellant at the hospital, and gave him instructions for applying as a crime victim for financial assistance in California because of his gunshot injuries. (CT 147; CT 140, 142.) Appellant subsequently returned to his home in New York City, where he is employed as a taxi driver. (CT 146.)

Appellant filed a timely application for assistance with appellee State Board of Control, which administers California's Victims of Crime Act. (CT 147, 149-150.) The Board refused to consider appellant's claim solely on the ground that he was a resident of New York and therefore ineligible for assistance. (CT 147-148.) It stated that

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[1]CT references are to the Clerk's Transcript which constituted the record on appeal below.

"[t]here is no provision for acceptance of an application from a nonresident applicant or victim." (CT 151.)[2]

B. Raising of the Federal Questions and Summary of Proceedings in the Courts Below.

After the Board rejected his application, appellant filed a timely petition for writ of mandate and complaint for declaratory and other relief in the Superior Court for the City and County of San Francisco. (CT 1-13.) The trial court heard the matter on the stipulated facts (CT 145-151), briefs (CT 14-45; CT 54-88; CT 98-124; CT 125-137), and oral argument. Appellant raised the federal questions in his petition and complaint and briefs in the trial court. (CT 1-13), CT 14-45, CT 98-124.) On May 16, 1978, the trial court entered judgment for the Board, denying a peremptory writ of mandate and dismissing the complaint. (CT 156.)

Appellant reiterated the federal questions in his briefs in the Court of Appeal. That court affirmed the judgment of the trial court. It relied on the hunting license case of *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978), to reject appellant's claim under the Privileges and Immunities Clause. In its view, "neither noncommercial elk hunting nor receiving compensation as a crime victim from the state in which the crime occurred is a basic right." 99 Cal.App.3d at 6.

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[2] In contrast to the California statute, the New York statute provides compensation for victims of crime in New York, regardless of residence; and it defines "victim" simply and inclusively as "a person who suffers personal physical injury as a result of a crime." N.Y. Exec. Law (McKinney) § 621. Appellant does not appear to be eligible for compensation under the New York statute because it applies only to victims of crimes that occur in New York. *Id.*

The Court of Appeal thus failed to meet the tests demanded by *Hicklin v. Orbeck,* 437 U.S. 518 (1978), and *Toomer v. Witsell,* 334 U.S. 385 (1948), namely: "Was there a substantial reason for the discrimination? Is there something to indicate that noncitizens constitute a peculiar source of the evil at which the discriminating statute is aimed? Is there a reasonable relationship between the danger presented by noncitizens and the discrimination practiced upon them?" 99 Cal.App.3d at 6.

The Court of Appeal also rejected appellant's claim under the Equal Protection Clause, on the grounds that "strict scrutiny" was "unnecessary and inappropriate" and that the residency requirement was "rationally related to the state's legitimate objective of cost savings." *Id.* at 7. It likewise rejected appellant's other constitutional arguments. *Id.* at 8.

Appellant reiterated the federal questions in his petition for hearing to the Supreme Court of California. That court denied appellant's petition; hence this appeal.

C. The California Victims of Crime Act

1. The act declares the public interest in assisting resident victims of crime, Cal. Gov. Code § 13959.[3] It defines a victim as "a person who sustains physical injury or death as a direct result of a crime of violence," or as a dependent or person who pays or assumes the medical or burial expenses incurred as a result of a death. § 13960(a).

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[3]All statutory references are to the Government Code of California unless otherwise specified.

2. A victim may file an application for assistance with the State Board of Control provided he meets the residency test. § 13961(a). After the application for assistance is reviewed and verified, § 13962, the State Board of Control holds a hearing, § 13963, and approves the application if the applicant is eligible for assistance. § 13964.

3. Assistance may include cash payments for pecuniary loss attributable to medical or medical-related expenses up to $10,000, loss of wages or support up to $10,000, job retraining or similar rehabilitative services up to $3,000, and attorneys' fees up to 10% of the award or $500, whichever is less. § 13965. The State is subrogated to the victim's rights. § 13966.

4. The statute does not define the term "resident of California at the time the crime was committed." California Government Code section 244, however, sets forth rules for determining the place of residence and the State Board of Control has adopted a regulation, 2 Calif. Admin. Code § 649.12, defining the term "resident of California" for purposes of the Victims of Crime Act. (These provisions are quoted in the Court of Appeal's decision, 99 Cal.App.3d at 3 n. 1.)

Appellant was not, nor does he claim that while he was visiting California he was a "resident" under either of the foregoing provisions.

5. The state budget provides an appropriation for the payment of claims, § 13969, funded by tax revenues and an "Indemnity Fund" created by fines of up to $10,000 imposed on defendants convicted of crimes of violence. § 13967.

For the fiscal year 1976-77, when appellant suffered criminal attack, California paid to victims of crime approximately $5,614,865, about 1/2000 of the total general fund expenditures.[4]

Nonresidents contribute to the tax revenues that fund the Victims of Crime Act. California imposes a personal income tax on "the entire taxable income of every nonresident which is derived from sources within this state." Cal. Rev. & Tax. Code § 17041(a). In the income year 1976, nonresidents filed 110,900 personal income tax returns with the Franchise Tax Board of the State of California and were assessed a total of $16,934,000 in California personal income tax. See Cal. Franchise Tax Board, 1976 Ann. Rep. 84, 100.

Nonresidents also pay sales tax collected by retailers on nonexempt retail sales made in California, Cal. Rev. & Tax. Code §§ 6051, 6052, 6247, 6386-87; as well as inheritance tax and gift tax on taxable transfers of real property located in California. Cal. Rev. & Tax. Code §§ 13303, 13401, 13851, 14653, 15103, 15201, 15451. Moreover, nonresident tourists pay other taxes such as gasoline taxes directly or indirectly incident to their visits.

6. Correspondingly, the Indemnity Fund is in some measure dependent upon fines up to $10,000 levied against criminals whose victims are nonresidents. § 13967.

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[4] Report of the Legislative Analyst to the Joint Legislative Budget Committee, Analysis of the Budget Bill of the State of California for the Fiscal Year July 1, 1977 to June 30, 1978, p. 1015, and p. A-2 (total general fund expenditures of $10,889,681,293 for 1976-77); and the comparable Report for the Fiscal Year July 1, 1976 to June 30, 1977, pp. 65-66.

THE QUESTIONS ARE SUBSTANTIAL

1. The California residency test is repugnant to the Privileges and Immunities Clause

The United States Constitution, Article IV, Section 2 provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell,* 334 U.S. 385, 395 (1948). It inhibits a state from discriminating against nonresidents. *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 180 (1869). Unless the state can show that nonresidents constitute "a peculiar source of the evil at which the statute is aimed" and that the discrimination bears a "substantial relationship" to such evil, the statute is repugnant to the Privileges and Immunities Clause. *Hicklin v. Orbeck,* 437 U.S. 518, 526-27 (1978) (invalidating the "Alaska Hire" statute that gave a blanket employment preference to residents).

The Privileges and Immunities Clause reflects the principle of "mutual friendship" in Article IV of the Articles of Confederation. It "may be esteemed the basis of the Union." The Federalist No. 80 (A. Hamilton). It fosters interstate harmony and protects nonresidents who are not represented in the state's legislative halls. *Austin v. New Hampshire,* 420 U.S. 656, 660-61, 662 (1975). The protections of the Clause are not circumscribed as they once were by "natural rights" theory, *Corfield v. Coryell,* 6 Fed. Cas.

546 (No. 3230) (C.C.E.D. Pa. 1823). That theory, discarded by *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869), and dismissed as the product of a bygone era in *Hague v. C.I.O.,* 307 U.S. 496, 511 (1938), was "replaced by the view that the measure of the rights secured to nonresidents was the extent of the rights afforded by a State to its own citizens." *Baldwin v. Montana Fish & Game Comm'n,* 436 U.S. 371, 397 (1978) (dissenting opinion); see *Hicklin v. Orbeck,* 437 U.S. 518 (1978).

The Court has invoked the Privileges and Immunities Clause many times to strike down discrimination against nonresidents in such areas as taxation, abortion, license fees, access to courts, contract rights and creditors' preferences.[5] The instant case affords the Court its first oppor-

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[5]See *Austin v. New Hampshire,* 420 U.S. 656 (1975) (invalidating New Hampshire "Commuters Income Tax" on nonresidents); *Doe v. Bolton,* 410 U.S. 179 (1973) (invalidating statutory prohibition against nonresidents obtaining abortions in state; less restrictive alternatives available); *Mullaney v. Anderson,* 342 U.S. 415 (1952) (invalidating discriminatory license fee for commercial fishermen in territorial waters); *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230, 233 (1934) (invalidating restriction on nonresident access to state courts); *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 79-82 (1920) (invalidating preferential exemption treatment for residents); *Chalker v. Birmingham & N.W. Ry.,* 249 U.S. 522 (1919) (invalidating license tax that discriminated against nonresident contractors); *Blake v. McClung,* 172 U.S. 239 (1898) (invalidating statutory preference for creditors resident in Tennessee); *Ward v. Maryland,* 79 U.S. (12 Wall.) 418, 424 (1871) (invalidating special tax on nonresidents for privilege of selling goods produced in other states).

For state court cases, see *Salla v. County of Monroe,* 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) *cert. denied* . . . U.S. . . . , 48 LW 3676 (No. 79-1335) (1980) (invalidating statutory preference for New York residents on public works projects); *In the Matter of Gordon,* 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (invalidating state bar durational residency requirement); *Borden v. Selden,* 259 Iowa 808, 146 N.W. 2d 306, 312-14 (1966) (invalidating tax statute that discriminated against non-

tunity to address the issue of discrimination against nonresidents under a state compensatory statute and to guard against any impairment of the Privileges and Immunities Clause via pleas in the name of "cost savings" or "administrative convenience" that are in any event hypothetical.[6] Such pleas shrivel before a clause that explictly encompasses *all* privileges and immunities, thus positing a rule that yields "only in an extreme case" in much the same way as "the seemingly unyielding prohibition of the first amendment." Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 388 (1979). Moreover, "when the benefits of a law are potentially available to the population of the state in general, and when extension of its benefits to

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residents); *State v. Nolfi*, 141 N.J. Super. 528, 358 A.2d 853, 858-59 (1976) (invalidating exclusion of criminal defendant, a resident of New York City, from pretrial intervention program in Hudson County, New Jersey); *Quong Ham Wah Co. v. Industrial Accident Comm'n*, 184 Cal. 26, 38, 41, 192 Pac. 1021 (1920) *writ of error dismissed*, 255 U.S. 445 (1921) (extending workmen's compensation statute to certain claims by nonresidents); *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424 (1903) (extending exemption under state inheritance tax to nonresidents).

[6]Noncompensatory programs also cost money and involve administrative inconvenience. For example, had appellant asked the San Francisco police to investigate the crime and been refused on the ground that he was a citizen of New York, the refusal unquestionably would have been unconstitutional. No contention that California could conserve financial resources or avoid administrative inconvenience by denying police protection to visitors would be sustained. Moreover, had appellant filed a civil action against the sniper in a California court and been told that California tort remedies are only available for residents, he would unquestionably obtain relief under the Privileges and Immunities Clause. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934). No contention that California can improve its budget or improve administrative convenience by denying judicial remedies to nonresident victims would be upheld. See also *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (no intimation Georgia medical facilities were "utilized to capacity in caring for Georgia residents").

citizens of other states would advance the mutual interests of all states by avoiding the cycle of retaliation and reciprocity, the Constitution requires such extension." Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities,* 69 Yale L.J. 1323, 1391 (1960).

Nonresidents do not visit California to become victims of violent crime to qualify for the limited assistance available under the statute. Victims of crime, unlike elk hunters, *e.g. Baldwin v. Fish & Game Comm'n.,* 436 U.S. 371 (1978),[7] or students seeking preferential tuition rates, *e.g., Kirk v. Board of Regents,* 273 Cal.App.2d 430 (1969), *appeal dismissed,* 396 U.S. 554 (1970), have no control over the circumstance that makes the state program applicable, namely, a violent crime.

The *Hicklin* and *Toomer* tests, demanding a "substantial reason" for the discrimination and a "substantial relationship" to the "peculiar source of the evil" purportedly represented by nonresidents, are incompatible with the routine of categorizing rights that was resurrected temporarily in *Baldwin.* The Court of Appeal's purported "synthesis" is illusory; and, if allowed to stand, it will encourage further impairment of the Privileges and Immunities Clause via discrimination based on "state attachments, state prejudices, state jealousies, and state interests" that this Court is empowered to guard against. *Martin v. Hunter's Lessee,*

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[7]It bears noting also that *Baldwin's* reliance on the state's special interest in controlling wildlife resources, *e.g.,* its citation to *Geer v. Connecticut,* 161 U.S. 519 (1896) is inapplicable to a program of monetary assistance to victims of violent crime, and that the *Geer* case was recently overruled in *Hughes v. Oklahoma,* 441 U.S. 322 (1979).

14 U.S. (1 Wheat.) 304, 347 (1816). By taking jurisdiction, this Court can determine unequivocally that the *Hicklin-Toomer* tests are not rendered inoperative by some arbitrary classification of a privilege or immunity as less than "basic" or "fundamental."

The California statute fails the *Hicklin-Toomer* tests and discriminates against nonresidents irrationally, arbitrarily, and unconstitutionally:

(a) No reason is set forth for the residency requirement in either the statute or any legislative history. A residency requirement per se "makes no sense." Edelhertz & Geis, *Public Compensation to Victims of Crime* 268 (1974).

(b) The exclusion of a crime victim solely because of his nonresidency adds injury to injury for no good reason. Consider the following examples:

(i) A, a former resident of Vermont, enters California with the intention of becoming a resident. Five minutes after becoming a California resident, he is shot by a sniper. Discouraged by the violence, A changes his mind, returns immediately to Vermont, and resumes residency there. A may receive compensation. The state candidly acknowledged in the trial court that:

> "If someone crossed the border into California with the requisite intent to remain indefinitely and to make California his home and if he was immediately victimized, he would satisfy the residency requirement." (CT 64, lines 7-11.)

(ii) B, a New York citizen, is temporarily assigned to her employer's California branch. While temporarily in California, B is shot by a sniper. B pays income taxes to

California on the income she earns here. The sniper is convicted and is fined $10,000 which is paid to the Indemnity Fund. B is not eligible for compensation.

(c) There is no showing that nonresidents constitute a peculiar source of the supposed costs and administrative inconvenience. Indeed, the claims of nonresident victims in California are likely to cause far less cost and inconvenience than the claims of many resident victims who are assured compensation for criminal violence outside of California.

(d) The residency test cannot be justified as a legitimate restriction of funds for needy Californians. Had petitioner been a resident of California when he was shot and moved to New York the next day, he would have been eligible for compensation. The residency test cannot even be justified as an administrative convenience for budgeting purposes. The state of residence of all crime victims is not an easily obtainable or a regularly kept statistic and is not a rational budgeting mechanism. Indeed, the statutory coverage of California residents even for injuries out of state introduces such uncertainty for planning purposes that no administrative convenience or budgetary contention is tenable.

(e) The statute relates directly to the capacity of the victim to earn a livelihood. It authorizes compensation for specific purposes: medical or medical related expenses; loss of wages or support; and job retraining or similar employment-oriented rehabilitative services. § 13965. Such compensation, though it may not make the victim whole, at least ameliorates his injury. It is hardly rational to

equate a nonresident victim of gunshot with a nonresident hunter who merely pays a premium for wielding a gun.

(f) The residency test causes "total deprivation" rather than merely "delay" and hence is far harsher than a durational residency requirement of one year to obtain a divorce, as in *Sosna v. Iowa*, 419 U.S. 393, 410 (1975), or to obtain preferential tuition rates, as in *Kirk v. Board of Regents, supra.*

In brief, the time for a "fresh look at the clause is long overdue." Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 401 (1979).

2. The California residency test also is repugnant to the Equal Protection Clause, the Commerce Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment

Although the Court has decided a number of durational residency cases, it has deliberately left open the issue of nondurational residency requirements under statutes such as the one in the instant case. *See Shapiro v. Thompson*, 394 U.S. 618, 638 n.21 (1969); *Austin v. New Hampshire*, 420 U.S. 656, 668 (1975).

The reasons for strict scrutiny of discrimination based solely on nonresidency go beyond the text of the Privileges and Immunities Clause. Nonresidents are not represented in the discriminatory state's legislature. *Austin v. New Hampshire, supra*, 420 U.S. at 662. Preventing arbitrary discrimination against them in one state prevents retaliation by other states and helps maintain "the structural

balance essential to the concept of federalism." *Id.* Discrimination based on nonresidency alone almost always is based on a fortuitous circumstance that rarely if ever results in a close fit of statutory purpose and classification. See, *Craig v. Boren,* 429 U.S. 190, 197, 201, 202 (1976). The so-called cost and convenience contentions advanced by the state are "after-the-fact rationalizations." The State cannot demonstrate that the residency test was adopted with such reasons in mind. *See Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 653 (1974) (concurring opinion of Powell, J.); *Vlandis v. Kline,* 412 U.S. 441, 449 (1973); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 115 (1976). The state's discrimination raises substantial questions of equal protection;[8] interstate commerce;[9] the

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[8]See *Takahashi v. Fish & Game Comm'n,* 334 U.S. 410 (1948) (invalidating denial of fishing license to alien; companion case to *Toomer v. Witsell, supra*); *Sugarman v. Dougall,* 413 U.S. 634 (1973) (invalidating U.S. citizenship requirement); *In re Griffiths,* 413 U.S. 717 (1973) (similar); *Hanson v. Unified Sch. Dist.,* 364 F. Supp. 330 (D. Kan.) (1973) (invalidating nondurational residence requirement for teachers); *Kramer v. Union Free School Dist.,* 395 U.S. 621 (1969) (invalidating property or parenthood eligibility requirement for voting in school district election); Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. Rev. 205, 224 (1964) (re denial of the protection of the laws to victims of crime). See also the following cases invalidating durational residency requirements: *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (free nonemergency medical care for indigents); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (voting); *Shapiro v. Thompson,* 394 U.S. 618 (1969).

Cf. *United States v. Carolene Products Co.,* 304 U.S. 144, 152-153 n.4 (1938) ("more searching judicial inquiry" into "prejudice against discrete and insular minorities").

[9]U.S. Const., Art. I, § 8; *Edwards v. California,* 314 U.S. 160 (1941); *Hicklin v. Orbeck,* 437 U.S. 518, 532-534 (1978); *In the Matter of Gordon,* 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). The Court has under consideration the Commerce Clause case of *Reeves, Inc. v. State,* (Docket No. 79-677) that involves South Dakota's preference for residents in the disposition of its cement resources.

privileges or immunities of national citizenship under the Fourteenth Amendment,[10] and the right of travel;[11] Comparable substantial issues also arise under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983.[12]

CONCLUSION

The Constitution of the United States was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig,* 294 U.S. 511, 523 (1935). The Privileges and Immunities Clause embodies a spirit of neighborliness, a "norm of comity." *Austin v. New Hampshire,* 420 U.S. 656, 660 (1975). It should not be vitiated by arbitrary discrimination or by a residency requirement that "makes no sense." Edelhertz & Geis, Public Compensation to Victims of Crime 268 (1974). The instant case affords this Court a timely opportunity to reverse a spuriously reasoned de-

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[10]See *Edwards v. California* (1941) 314 U.S. 160, 177, 181 (concurring opinion); Tribe, *American Constitutional Law* 426 (1978).

[11]See *Shapiro v. Thompson,* 394 U.S. 618, 632, 628 n.21 (1969); *United States v. Guest,* 383 U.S. 745, 757 (1966); *Edwards v. California, supra; Dunn v. Blumstein,* 405 U.S. 330 (1972); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974); *Fisher v. Reiser,* 610 F.2d 629, 637 (9th Cir. 1979) (dissenting opinion). Compare *McCarthy v. Philadelphia Civil Serv. Comm'n,* 424 U.S. 645 (1976) (upholding *municipal* ordinance requiring that fire fighters be city residents).

[12]In the courts below, the state raised an immunity defense to the section 1983 claim. However, this action was commenced in a state court and sought mandatory and declaratory relief against a state agency and officials, not damages. See *Williams v. Horvath,* 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal.Rptr. 453 (1976) (state court jurisdiction); *cf. Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Owen v. City of Independence,* U.S. , 48 LW 4389 (1980); Compare *Quern v. Jordan* (1979) 440 U.S. 332 (re possible limited liability of state in a *federal* court action, because of the Eleventh Amendment restriction on the judicial power of the United States).

cision, prevent a mischievous precedent, and reinforce the tests of *Hicklin v. Orbeck,* 437 U.S. 518 (1978).

In this context, it would be constructive for this Court to note probable jurisdiction and to reverse the judgment below.

Dated: May 21, 1980

Respectfully submitted,

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(Appendix follows)

APPENDIX

Appendix

In the Court of Appeal of the State of California
First Appellate District—Division Four

1 Civil 45277

(Sup. Ct. No. 734773)

BERNARD OSTRAGER,
Plaintiff and Appellant,

vs.

STATE BOARD OF CONTROL, and the individual members thereof, KENNETH CORY, RUTH CHURCH GUPTA, DAVID JANSSEN, in their official capacities as members of the State Board of Control,
Defendants and Respondents.

Certified for Publication

Filed Nov. 29, 1979

OPINION

This action challenges the residency requirement of the California Victims of Crime statute, Government Code sections 13959-13969.1.

While vacationing in San Francisco, appellant, a citizen of the State of New York, was shot in the leg by a person unknown to him. He was hospitalized for surgical and medical treatment in San Francisco and then returned to his home. He filed an application for assistance with the

respondent board which administers California's Victims of Crime statute. Respondent refused to accept that application because appellant was not a resident of California at the time the crime was committed.

After his application was rejected, appellant petitioned for writ of mandate, declaratory and other relief, seeking both a determination that the residency limitation in the Victims of Crime statute is unconstitutional and an order directing respondent to entertain his application. An alternative writ issued. Respondents demurred generally to the petition. The trial court sustained the demurrer without leave to amend. This appeal is from the judgment that followed.

THE CALIFORNIA VICTIMS OF CRIME ACT

The California Victims of Crime Act begins by declaring that: "It is in the public interest to indemnify and assist in the rehabilitation of those residents of the State of California who as the direct result of a crime suffer a pecuniary loss." (Gov. Code, § 13959.)[1] A victim may

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[1]The statute does not define the term "resident of California at the time the crime was committed." However, Government Code section 244 sets forth rules for determining the place of residence. In relevant part, section 244 provides: "(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose. [¶] (b) There can only be one residence. [¶] (c) A residence cannot be lost until another is gained. . . . [¶] (f) The residence can be changed only by the union of act and intent. . . ."

The State Board of Control has adopted a regulation, 2 California Administrative Code section 649.12, defining the term "resident of California" for purposes of the Victims of Crime statute. That regulation provides "Resident of California, for purposes of this article, means a citizen of this state as defined in Government Code Section 241, or an alien residing in California who is in possession of a document issued by the United States Immigration and

apply for assistance with the State Board of Control if he or she "was a resident of California at the time the crime was committed and either: [¶] (1) The crime was committed in California; or [¶] (2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state." (Gov. Code, § 13961, subd. (a).)

Appellant does not claim that while he was visiting California he was a "resident" under either of the foregoing provisions. Instead, he challenges the constitutionality of the residency requirement.

I. *Privileges and Immunities Clause of Article IV.*

Appellant's principal challenge is made under the Privileges and Immunities Clause of Article IV of the United States Constitution, the contours of which the Supreme Court itself admits have not been "precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789." (*Baldwin v. Montana Fish and Game Comm'n* (1978) 436 U.S. 371, 379.) Two very recent decisions of the United States Supreme Court, *Baldwin* v. *Montana Fish and Game Comm'n, supra,* and *Hicklin* v. *Orbeck* (1978) 437 U.S. 518, decided within a month of each other, offer clear guidance in this area.

In *Baldwin,* Montana's elk-hunting license statutes, under which nonresident elk hunters were charged 25 times as

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Naturalization Service which authorizes such person to reside in this state."

Government Code section 241, referred to in the regulation, provides that: "The citizens of the State are: [¶] (a) All persons born in the State and residing within it, except the children of transient aliens and of alien public ministers and consuls. [¶] (b) All persons born out of the State who are citizens of the United States and residing within the State."

much as the residents, were held not to violate the Privileges and Immunities Clause. Mr. Justice Blackmun's majority opinion traces the history of the clause, reviews the cases interpreting it and in so doing emphasizes the rationale of *Corfield* v. *Coryell,* 6 F. Cas. 546, 552 (No. 3,230 (CCED Pa. 1825)):

> "In his opinion in *Coryell,* Mr. Justice Washington . . . included in his list of situations, in which he believed the States would be obligated to treat each other's residents equally, *only those where a nonresident sought to engage in an essential activity or exercise a basic right.*" (Emphasis added.)

The court then uses the *Corfield* analysis in deciding that the distinction between residents and nonresidents made by Montana in establishing access to elk hunting does not "threaten a basic right in a way that offends the Privileges and Immunities Clause." (*Id.*, at p. 388.)

We find by identical reasoning that the Privileges and Immunities Clause is not violated by requiring applicants for compensation under the California Victims of Crime statute to be Californians. Nor do we understand appellant to challenge the conclusion that if the *Corfield* analysis applies, the Privileges and Immunities Clause is not violated. Rather, appellant contends that we should view the *Baldwin* decision as "an aberration" and instead should apply the rationale of *Hicklin v. Orbeck, supra,* decided one month after *Baldwin.* There the high court applied the Privileges and Immunities Clause to invalidate the "Alaska Hire" law which required that Alaskans be hired in preference to nonresidents for oil and gas pipeline work.

Justice Brennan's opinion in *Hicklin* likened the case to prior decisions which invalidated state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the state. In that review he characterized *Toomer v. Witsell,* 334 U.S. 385 as "the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents."

> " . . . (*Toomer*) invalidated a South Carolina statute that required nonresidents to pay a fee one hundred times greater than that paid by residents for a license to shrimp commercially in the three-mile maritime belt off the coast of that State. The Court reasoned that although the Privileges and Immunities Clause 'does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it,' *id.*, at 396, 68 S.Ct., at 1162, '[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.' *Ibid.* A 'substantial reason for the discrimination' would not exist, the Court explained, 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.' (*Id.*, at 398, 68 S.Ct., at 1163. Moreover, even 'where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.' *Id.*, at 399, 68 S.Ct., at 1164. *Toomer's* analytical framework was confirmed in *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), where it was applied to invalidate a scheme used by the Ter-

> ritory of Alaska for the licensing of commercial fishermen in territorial waters; under that scheme residents paid a license fee of only $5 while nonresidents were charged $50." (Hicklin, supra, at pp. 525-526.)

Appellant here invites us:

(1) to ignore the *Baldwin* test (i.e., is the nonresident seeking to engage in an essential activity or seeking to exercise a basic right?) as aberrational, as irrelevant or as of no precedential value given the clear standards reaffirmed in *Hicklin*, and,

(2) to apply the *Toomer-Hicklin* test (i.e., is there a substantial reason for the discrimination?).

In our view, that approach is itself a deviation from the proper course because it is premised on a reading of *Hicklin* as being at odds with its 30-day-older sibling, *Baldwin*. It is apparent to us that the two decisions by the Supreme Court are entirely consistent with each other and were intended to be. If a state distinguishes between its citizens and those of a sister state, the teaching of *Baldwin* is to first ask whether the activity at issue was essential or involved the exercise of a basic right. If the answer to that question is in the negative, as it was in *Baldwin* and is here, no further analysis is required. Neither noncommercial elk hunting nor receiving compensation as a crime victim from the state in which the crime occurred is a basic right. On the other hand, if the *Baldwin* question is answered affirmatively, as when the nonresident seeking to practice an occupation is discriminated against, then the *Toomer-Hicklin* three question analysis must be applied. Was there a substantial reason for the discrimination? Is

there something to indicate that noncitizens constitute a peculiar source of the evil at which the discriminating statute is aimed? Is there a reasonable relationship between the danger presented by noncitizens and the discrimination practiced upon them?

This synthesis of *Baldwin* and *Hicklin* is not spun from this Court of Appeal but is the pure product of the United States Supreme Court: we count four separate occasions in the terse, unanimous, *Hicklin* opinion in which the *Baldwin* decision is specifically referred to and relied upon. Nowhere in the *Hicklin* opinion do we find any explicit or implicit criticism of *Baldwin* or its rationale. Accordingly, we reject appellant's Privileges and Immunities Clause challenge.

II. *Equal Protection*

Appellant's second basis of constitutional attack is the Equal Protection Clause of the Fourteenth Amendment. He urges that the Victims of Crime statute is subject to strict judicial scrutiny because it invidiously discriminates between residents and nonresidents. Appellant points to no authority to support the theory that nonresidents should be afforded "suspect classification" treatment, nor are we able to find or create any.

As an alternative ground for invoking the strict scrutiny standard of review, appellant maintains that the Victims of Crime statute deprives him of his fundamental right to travel. Along this vein, he relies on several United States Supreme Court cases involving statutes drawn in question because of their *durational* residency requirements. (See, e.g., Shapiro v. Thompson (1969) 394 U.S. 618; Dunn v.

Blumstein (1972) 405 U.S. 330; Memorial Hospital v. Maricopa County (1974) 415 U.S. 250.) But here, unlike the situations involved in those cases, the residency requirement is not durational—that is, the migrant is not required to maintain the "resident" status for a certain period before he qualifies for benefits. (Ector v. City of Torrance (1973) 10 Cal.3d 129, 135-136.) Consequently, appellant's right to travel has not been infringed.[2]

Strict scrutiny being unnecessary and inappropriate, the residency requirement for the Victims of Crime statute must be upheld against an equal protection challenge if there is any rational relationship between the requirement and some legitimate state objective. The "Legislature is presumed to have acted constitutionally, and statutory classifications may be set aside only if no ground can be conceived to justify them, and they are wholly irrelevant to the achievement of the state's objective. (McDonald v. Board of Election (1969) 394 U.S. 802, 809; McGowan v. Maryland (1961) 366 U.S. 420, 425-426.)" (Adams v. Superior Court, supra, 12 Cal.3d 55, 62.) We find the residency requirement of the Victims of Crime statute to be rationally related to the state's legitimate objective of cost savings. (See, e.g., Baldwin, supra, at p. 391; Kirk v. Regents of University

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[2]When faced with the issue of whether a durational residency requirement for jurors impermissibly infringed upon an individual's right to travel, the California Supreme Court found "neither evidence nor reason to believe that one year's exclusion from jury duty is a factor materially affecting a person's decision to migrate, and any penalizing effect of the durational residency requirement is *inconsequential*. Thus, the requirement has *insufficient effect* on the right to travel to compel strict judicial scrutiny." (Adams v. Superior Court (1974) 12 Cal.3d 55, 62, emphasis added.)

Even if the residency requirement in the Victims of Crime statute would deter some individuals from visiting the state, we believe that the extent of any such deterence would be "inconsequential."

of California (1969) 273 Cal.App.3d 430, appeal dismissed 396 U.S. 554 (1970).)

III. *Other Grounds.*

The residency requirement does not operate as an impediment to travel and accordingly we reject appellant's claims under both the Privileges and Immunities Clause of the Fourteenth Amendment and the Interstate Commerce Clause. Any interference with appellant's freedom of movement is at most inconsequential. (See fn. 2, supra.)

Lastly, appellant presents a blanket argument that because "California has the independent authority and independent reasons for vigorously striking down irrational discrimination, irrespective of whether it also violates the Constitution of the United States" the Victims of Crime statute is unconstitutional under the California Constitution. Although we recognize that California may independently interpret its own Constitution (Serrano v. Priest (1976) 18 Cal.3d 728, 764) we are unconvinced that an independent interpretation would yield a contrary result in this case.

The judgment is affirmed.

Poché, J.

WE CONCUR:

Rattigan, Acting P.J.

Christian, J.

Order Due February 27, 1980

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 45277

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

[Filed Feb. 27, 1980]

Ostrager

v.

State Board of Control et al.

Manuel, J., did not participate.

Appellant's petition for hearing DENIED.

Newman, J., is of the opinion that the petition should be granted.

/s/ Bird

Chief Justice

In the Court of Appeal of the State of California
First Appellate District - Division Four

1 Civil 45277

(Sup. Ct. No. 734773)

[Filed May 16, 1980]

Bernard Ostrager,

Appellant,

vs.

State Board of Control, and the individual members thereof, Kenneth Cory, Ruth Church Gupta, David Janssen, in their official capacities as members of the State Board of Control,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bernard Ostrager, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in this action on November 29, 1979, affirming the judgment denying peremptory writ of mandate and dismissing the complaint for declaratory

relief and relief under the Federal Civil Rights Act, entered in this action on May 16, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 16, 1980

MICHAEL TRAYNOR
COOLEY, GODWARD, CASTRO,
HUDDLESTON & TATUM

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
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By MICHAEL TRAYNOR
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